

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

**CHERYL STUTESMAN**  
Claimant

VS.

**BEST WESTERN HOSPITALITY HOUSE**  
Respondent

AND

**KANSAS RESTAURANT & HOSPITALITY  
ASSOCIATION SELF INSURANCE FUND**  
Insurance Fund

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Docket No. 1,000,726

**ORDER**

Respondent and its insurance fund appealed the May 9, 2002 preliminary hearing Order for Compensation entered by Administrative Law Judge Brad E. Avery.

**ISSUES**

The parties stipulated that on or about October 9, 2001, claimant slipped and fell at work. This is a claim for that work-related accident.

At the May 3, 2002 preliminary hearing before Judge Avery, claimant sought temporary total disability benefits commencing October 9, 2001. Respondent and its insurance fund did not contest whether claimant's accident arose out of and in the course of employment. The primary issue before the Judge was whether claimant satisfied the definition of being temporarily and totally disabled.

In the May 9, 2002 Order for Compensation, Judge Avery awarded claimant temporary total disability benefits. The Judge, however, ordered those benefits for the period from October 4, 2001, to January 14, 2002.

Respondent and its insurance fund contend Judge Avery erred. They argue claimant's date of accident was October 9, 2001, and, therefore, the Judge lacked the authority to award temporary total disability benefits for the period before the accident occurred. They also contend that no temporary total disability benefits should have been

awarded as claimant was allegedly capable of engaging in substantial, gainful employment and had been offered work within her restrictions. Accordingly, respondent and its insurance fund request the Board to reverse the May 9, 2002 preliminary hearing Order for Compensation and deny claimant's request for temporary total disability benefits.

Conversely, claimant concedes the date of accident was October 9, 2001, and, therefore, commencing the temporary total disability benefits on October 4, 2001, was simply a typographical error. Claimant also argues that there are no other jurisdictional matters before the Board. Accordingly, claimant requests the Board either to dismiss the respondent and its insurance fund's appeal or to affirm the May 9, 2002 Order for Compensation.

The only issues before the Board on this appeal are:

1. Does the Board have jurisdiction at this juncture of the claim to review the Judge's preliminary finding that claimant was temporarily and totally disabled?
2. If so, is claimant entitled to temporary total disability benefits for the period in question?
3. Should the award of temporary total disability benefits be modified to commence October 9, 2001, instead of October 4, 2001?

#### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

After reviewing the record compiled to date, the Board finds and concludes:

This is an appeal from a preliminary hearing order. The issue whether claimant was temporarily and totally disabled following her work-related accident is not a jurisdictional issue and is not subject to review at this stage of the proceedings.

The Board's review of preliminary hearing orders is limited. Not every alleged error in law or fact is subject to review. The Board can review only allegations that an administrative law judge exceeded his or her jurisdiction. K.S.A. 2001 Supp. 44-551. This includes review of the preliminary hearing issues listed in K.S.A. 44-534a as jurisdictional issues, which are (1) whether the worker sustained an accidental injury, (2) whether the injury arose out of and in the course of employment, (3) whether the worker provided timely notice and timely written claim, and (4) whether certain other defenses apply. The term "certain defenses" refers to defenses which dispute the compensability of the injury under the Workers Compensation Act.<sup>1</sup>

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<sup>1</sup> *Carpenter v. National Filter Service*, 26 Kan. App. 2d 672, 994 P.2d 641 (1999).

The issue whether a worker satisfies the definition of being temporarily and totally disabled is not a jurisdictional issue listed in K.S.A. 44-534a. Additionally, the issue whether a worker meets the definition of being temporarily and totally disabled is a question of law and fact over which an administrative law judge has the jurisdiction to determine at a preliminary hearing.

Jurisdiction is defined as the power of a court to hear and decide a matter. The test of jurisdiction is not a correct decision but a right to enter upon inquiry and make a decision. Jurisdiction is not limited to the power to decide a case rightly, but includes the power to decide it wrongly.<sup>2</sup>

As provided by the Act, preliminary hearing findings are not final but subject to modification upon a full hearing of the claim.<sup>3</sup>

The Board concludes the October 4, 2001 date which the Judge used to commence claimant's temporary total disability benefits was a typographical error in the May 9, 2002 Order for Compensation. Accordingly, the Order for Compensation should be corrected to reflect that the temporary total disability compensation should commence October 9, 2001. For future reference, the parties are directed to request the administrative law judge to enter a Nunc Pro Tunc order to correct the typographical errors that may appear in the orders from that judge.

**WHEREFORE**, the Board corrects the typographical error that appears in the May 9, 2002 Order for Compensation. Accordingly, October 9, 2001, replaces October 4, 2001, as the appropriate date for the commencement of claimant's temporary total disability benefits. Further, the Board dismisses respondent and its insurance fund's appeal.

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of July 2002.

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BOARD MEMBER

c: Michael C. Helbert, Attorney for Claimant  
Jeffery R. Brewer, Attorney for Respondent and its Insurance Fund  
Brad E. Avery, Administrative Law Judge  
Philip S. Harness, Workers Compensation Director

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<sup>2</sup> *Allen v. Craig*, 1 Kan. App. 2d 301, 303-304, 564 P.2d 552, rev. denied 221 Kan. 757 (1977).

<sup>3</sup> K.S.A. 44-534a.